In the matter of:	)	
Expedited Consideration **for** Declaratory Rulings	)	
On the transfer of traffic only under AT&T		
Tariff Section 2.1.8., **and** Related Issues	)	
	)	
Primary Jurisdiction Referral	)	
From the NJ District Court	)	
	)	WC Docket No. 06-210
One Stop Financial, Inc.	)	DA-06-2360
Group Discounts, Inc.	)	Formerly CCB/CPD 96-20
Winback & Conserve Program, Inc.	)	
800 Discounts, Inc.	)	
	)	
Petitioners	)	
and	)	
	)	
AT&T Corp.	)	
Respondent	)	

AT&T'S RESPONSE TO PETITIONERS' EX PARTE COMMENTS CONCERNING AT&T'S SUPPOSED "CONCESSION" TO THE DISTRICT COURT AND THEIR "NOTICE" PURPORTING TO CLOSE THE COMMENT PERIOD

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April 11, 2007

AT&T Corp. submits this brief response to petitioners' recent ex parte filings.[1] In the April 4th Ex Parte, Mr. Inga claims that, in a November 1995 brief to Judge Politan, AT&T explicitly conceded that **"under the tariff PSE is not reponsible to assume the plan obligations** (revenue commitments and associated shortfall and termination charges)—CCI remains obligated for these plan obligations." *Id.* at 2. Deeming this "the final nail in [AT&T's] coffin," *id.* at 3, Mr. Inga has peremptorily announced that petitioners and their supporting commenters "have no further information to add" and that Mr. Inga will therefore

> upload this FCC notification as notice that comments are closed on this issue and for the FCC to issue 203(c) violation on the traffic only transfer issue. The traffic only transfer issue is now finalized in petitioners [sic] favor.

April 9th Ex Parte at 2.

Like so many of petitioners' arguments in this proceeding, petitioners' April 4th Ex Parte rests on an obviously baseless—and apparently willful—misreading of AT&T's prior submission. Petitioners base their claimed "concession" on the following passage from AT&T's 1995 brief:

> First, a transfer of substantially all of the locations on the plans would have the result of increasing the potential shortfall to AT&T. Secondly, the possibility that CCI will be unable to satisfy its tariffed obligations because it is transferring its principal assets—the end-user accounts—to PSE would leave CCI with no apparent revenue stream to meet its existing commitments and no apparent assets from which to satisfy potential shortfall liability, These charges are all "tariffed" obligations, for which CCI, not PSE (which would have the revenue stream to satisfy such charges), would be obligated.

See Exh. 1 attached hereto at 5.

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[1] *See* Ex Parte Comments of 800 Discounts, Inc. (April 4,2007) ("April 4th Ex Parte") and Ex Parte Comments of 800 Discounts, Inc., Winback & Conserve Program, Inc., Group Disounts, Inc. and One Stop Financial, Inc. (the "April 9th Ex Parte"),

What petitioners (characteristically) neglect to mention is that this passage is taken from the portion of its brief in which AT&T requested the posting of a bond if it was ordered, over its objections, to process the transfer that petitioners proposed—Le., a transfer in which **PSE** did not agree to accept all of CCI's obligations, including its obligation to pay shortfall and termination charges. The passage in question appears under the heading: "***IF THE COURT WERE TO ISSUE AN INJUNCTION***, THE INJUNCTION BOND SHOULD BE $15,000,000." *Id.* (emphasis added). The sentence that immediately precedes the passage petitioners quote states that "[t]he harm resulting from **an** order for AT&T *to* ***execute the*** *CCI-PSE transfer* are two-fold." *Id.* (emphasis added).

Thus, in this section of its brief, AT&T was obviously not conceding that PSE did not have to assume CCI's obligations **"under the tariff." April 4th Ex** Parte at ***2.*** Rather, AT&T was describing the transfer petitioners wanted, not the requirements of § 2.1.8, **and** it **was** discussing the harms it would suffer if it was compelled to execute a transfer in which the transferee did not comply with § 2.1.8's requirement that it accept "all" of the transferee's obligations. Indeed, in reversing the injunction that Judge Politan ordered, the Third Circuit explained that Judge Politan had enjoined AT&T **'Yo** grant the plaintiffs' request to transfer traffic *without* ***the*** *accompanying liability for shortfall and* ***termination charges." See*** Exh. _ at 4 (emphasis added). In its brief before Judge Politan, therefore, AT&T asked for a $15 million bond precisely because the injunction petitioners sought would force AT&T to process a transfer that § 2.1.8 did not permit, and would thus **expose** AT&T to the very harms § 2.1.8 was designed to prevent. It defies logic and common sense to argue, **as** petitioners do, that AT&T was seeking **a** $15 million bond to protect it from harms caused **by** the operation of § 2.1.8 itself. Similarly, it is absurd to contend that AT&T refused to execute the transfer because the transferee did not

accept all of the transferor's obligations, yet simultaneously conceded that § **2.1.8** permitted precisely this type of transfer.

Petitioners employ the same frivolously illogical and acontextual reading to argue (yet again) that the Commission has already determined that § 2.1.8's "all obligations" requirement does not include the obligation to **pay** shortfall and termination charges. **April** 9th **Ex** Parte at 2-7. In advancing this argument before Judge Bassler, petitioners quoted selectively from that portion of the Commission's decision that addressed AT&T's fraudulent use argument under § **2.2.4** of the tariff, Judge Bassler rejected these arguments, explaining that, because the Commission "only discussed shortfall and termination charges in the context of the fraudulent use provision," it "did not determine . . . whether **PSE** was required to assume those commitments under § 2.1.8, because it had already determined that § 2.1.8 did not apply." **Exh.** 11 to AT&T Opening Comments, May 26,2006 Op. at 14 n.5.

Petitioners now claim that Judge Bassler "made a critical error," and they quote extensively from the Commission's discussion of § 2.1.8 to "prove" that it "Absolutely Determined What Obligations **Are** Transferred Under Section 2.1.8." April 9th **Ex** Parte at **2.** Like their "fatal concession" claim, this argument simply makes no sense. **In** the portion of its 2003 decision discussing § 2.1.8, the Commission ruled that this provision "did not address—and therefore did not preclude or otherwise govern—the movement of end-user traffic from one aggregator to another, **as** CCI and PSE sought to effect in this **case."** Commission 2003 Decision, ¶ 9. Because the Commission concluded that § 2.1.8 did not apply at all to the CCI-PSE transfer, it plainly expressed no views about which obligations PSE would have had to assume if § 2.1.8 did apply—a fact that both Judge **Bassler** and the D.C. Circuit recognized. ***See*** May 26,2006 **Op.** at 16-17 (footnote omitted) (the issue whether the tariff permits a traffic

transfer where the transferee assumes "only those obligations assumed by PSE has yet to be answered. By finding that § 2.1.8 did not even apply to the CCI/PSE transfer, the FCC failed to answer that question"); D.C. Circuit Op. at 11 (declining to decide "precisely which obligations should have been transferred in this case, as this question was neither addressed by the Commission nor adequately briefed to us"). Thus, in describing the "benefits and obligations" CCI and PSE would have under their respective agreements with AT&T, *see* April 9th Ex Parte at *3* (quoting Commission 2003 Decision, ¶ 9), the Commission simply described the effect of the transfer petitioners proposed, not the operation of a provision the Commission deemed inapplicable to that transfer,

Mr. Inga will undoubtedly respond, as he has repeatedly in the past, that these straightforward and indisputably correct arguments are "bogus," or a "con," "scam" and "heavy smoke." April 9th Ex Parte at 1-2.[2] It thus seems unlikely that petitioners will, in fact, "have no additional comments to add to" this proceeding. *Id.* at 1. What is clear, however, is that petitioners have nothing legitimate to add.[3] Their efforts to prevail on the basis of trumped up "concessions" betrays a well-founded concern that the Commission will rule that the phrase "all obligations" naturally includes a transferor's obligation to pay shortfall charges,

[2] This style of intemperate argumentation is apparently reflexive for Mr. Inga. Petitioners' Reply Comments, which he authored (*see* Request for Combining Declaratory Rulings and Extension of Time to File Reply Comments ¶ 10), accused AT&T of "fraud" 20 different times, and used words such as "lies," "scams," "cons" and "bogus" over 150 times to describe AT&T's straightfonvard legal arguments.

[3] AT&T is at a loss to understand the distinction petitioners purport to draw between "actual commitments" and "joint and several liability commitments." April 4th Ex Parte at 2. Contrary to petitioners' apparent belief, joint and several liabilities are actual, they are simply shared by more than one entity. Nor is AT&T able to understand how Mr. Inga could believe that he has any authority to close the public comment period, let alone to announce that the "traffic only transfer issue is now finalized in petitioners [sic] favor," and to direct the Commission "to issue 203(c) violation on the traffic only transfer issue." April 9th Ex Parte at *2*.

Respectfully submitted,

/s/ Peter H. Jacoby

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April 11,2007

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of **April,** 2007, I served the foregoing "Response to Petitioners' **Ex** Parte Comments Concerning AT&T Supposed 'Concession' to the District Court and Their 'Notice' Purporting to Close the Comment Period" by first class mail to the following:

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Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., AND WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC., 800 DISCOUNTS, TNC., AND PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., Plaintiffs, v. AT&T CORP., Defendant.	: HQN. NICHOLAS H. POLITAN, U.S.D.J. : CIVIL ACTION NU. 95-908 (NHP)	

AT&T'S BRIEF IN CONNECTION WITH THE REHEARING ON PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

AT&T submits this brief in response to the Court's request for a discussion of two legal issues in connection with the rehearing of plaintiffs' application for a preliminary injunction: 1) the power of a district court simultaneously to issue a preliminary injunction in an action and to refer the ultimate decision on the merits on the grounds of primary jurisdiction; and 2) the appropriate level of security should an injunction be issued. AT&T also demonstrates why the Court should in no event grant injunctive relief.

In addition, AT&T submits the Second Supplemental Certification of Richard R. Meade ("Meade 2d Supp. Cert.") in response to *the* Court's request for information concerning: 1) why AT&T withdrew Tariff Transmittal Ma. 8179; 2) why the issue presented in Tariff Transmittal No. 8179 was combined with other issues in Tariff Transmittal No. *9229;* and 3) where Tariff Transmittal No. 9229 contains the issue "referred" to the Federal Communications Commission ("FCC") in Tariff Transmittal No. 8179.

I. THE COURT DOES NOT POSSESS THE AUTHORITY TO BOTH GRANT A PRELIMINARY INJUNCTION AND SIMULTANEOUSLY REFER AN ISSUE TO THE FCC.

The Court has requested that the parties brief the question whether a district court may simultaneously grant preliminary injunctive relief and refer an issue to an administrative agency on the ground of primary jurisdiction. Although there appears to be no authority directly addressing this precise issue, logic and

common sense strongly suggest that a court should not; grant preliminary injunctive relief and then refer an issue on the ground of primary jurisdiction for an ultimate decision. Such a ruling would be inconsistent with the requirement that an applicant for preliminary relief demonstrate a likelihood of success on the merits, Consequently, this Court should decline to issue a preliminary injunction and instead rely on the powers *of* the FCC to *issue* injunctive relief.

Among the four prerequisites to the grant of a preliminary injunction is a demonstration by the moving party of a reasonable likelihood that it will succeed on the ultimate merits of the *case.* *Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994); *see S&R Corp. v.* Jiffy Lube *Int'l, Inc.*, 968 F.2d 371, 374 (3d Cir. 1992).[1] The inability of a party to make such a demonstration precludes the granting of preliminary relief. *See, e.g., Bell v. Kidan*, 836 F. Supp. 125 (S.D.N.Y. 1993) (denying preliminary injunction because applicant had not shown likelihood of success on the merits); ***Broadcast Arts Productions,*** *Inc. v.* ***Screen*** *Actors Guild, Inc., 673* F. Supp. 701 (S.D.N.Y. 1987) (same holding).

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[1]As set forth in recent cases in this Circuit, the requirements are: (1) the likelihood that the applicant will prevail. on the merits at final hearing; (2) the extent: to which the plaintiff is irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. Jiffy ***Lube,*** 968 F.2d at 374; ***accord*** Opticians *Ass'n of Am.* ***v.*** *Independent* ***Opticians*** of *Am.*, 920 F.2d 187, 191-92 (3d Cir. 1990),

The issue that implicates the Court's power to grant injunctive relief in this case is whether it can find that plaintiffs have a "likelihood of success on the merits" while at the same time deferring to the FCC for ultimate resolution of the issue. A determination that an applicant will be likely to succeed on the merits generally results from a court's application of established law to a truncated factual record. Here, the law that the Court must apply on an undeveloped factual record is itself not clear. As the Court noted in its May 19, 1995 Opinion ["Opinion"), the legal issue at the heart of this dispute is "whether a plan and its attendant obligations under a tariff may be separated from its traffic." (Opinion at 15.) The Court then recognized that the question of "what amount of fractionalizing, if any, of plans" the relevant tariff provisions allow is not within the conventional experience of trial courts, but is "inherently within the realm of the Communications Act and its regulatory mechanisms." (*Id.* at 16.) That was true then and is true now.

The Court acknowledged that the FCC, not a district court, has the expertise and experience required to construe and harmonize tariff provisions. (*Id.*) That, too, remains true. That correct assessment undermines a grant *of* preliminary injunctive relief here. The sensible and correct finding that the Court does ***not*** have the expertise or experience needed to decide the ultimate merits of the dispute necessarily contradicts a finding that the plaintiffs have a likelihood of success. The prospect of that inconsistent finding precludes granting injunctive relief on

matters on which It lacks the conventional experience to render an ultimate decision.[2]

The ability of the FCC to issue emergent relief obviates the need for the Court to have to make such inconsistent rulings. The Communications Act expressly empowers the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions," 47 U.S.C. § 154(i), including the ability to afford emergent relief to individual litigants. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-181 (1968); *In the Matter of Petitions Filed by the EEOC*, 38 F.C.C. 2d 33, 38-39 (1972). *See also Business Wats, Inc. v. AT&T*, 7 F.C.C.R. 7942 (1992); *In the Matter of Comark Cable Fund III*, 104 F.C.C. 2d 451 (1985); *In re: Big Valley Cablevision, Inc.*, 85 F.C.C. 2d 973 (1981). That emergent relief includes the issuance of orders for a stay or similar preliminary injunctive relief. *See In re Application of Eldon L. Hueber*, 6 F.C.C.R. 736 (1991). Accordingly, the court should not now hear a preliminary injunction application on

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[2]Such an inconsistent finding should be avoided especially in cases such as this one, where plaintiffs seek mandatory injunctive relief. Moreover, when the mandatory, preliminary injunctive relief sought will constitute plaintiffs' final relief, such relief should only be granted at the preliminary stage of the proceedings in "rare instances" where the facts and law are clearly in favor of the moving party, especially if the grant of the temporary injunction would "in effect give plaintiff the relief which he seeks in the main case." *Miami Beach Fed. Sav. & Loan v. Callader*, 256 F.2d 410 (5th Cir. 1958); *Bricklayers, Masons, et al. v. Lueder Const. Co.*, 346 F. Supp. 558, 561 (D. Neb. 1972) (emphasis added).

a matter which it has properly determined to be suitable for resolution by the FCC on a primary jurisdiction referral.

II. IF THE COURT WERE TO ISSUE AN INJUNCTION, THE INJUNCTION BOND SHOULD BE $15,000,000

A party whose application for a preliminary injunction is granted may be required to past security in order *to* pay "such casts and damages as may be incurred or suffered by any party who is wrongfully enjoined or restrained." *Fed. R. Civ. P.* 65(c). The posting of a bond is required when the potential for monetary lass is substantial. System *Operations v.* Scientific *Games Dev. Corp.*, 555 F.2d 1131 (3d Cir. 1977). This is just such a case.

The harm resulting from an order for AT&T to execute the CCI-PSE transfer is two-fold. First, a transfer of substantially all of the locations on the Plans would have the result of increasing the potential shortfall to AT&T. Second the possibility that CCI will be unable to satisfy its tariffed obligations because it is transferring its principal assets --- the end user accounts --- to FSE would leave CCI with nu apparent revenue stream to meet its existing commitments and no apparent assets from which to satisfy potential. shortfall liability. These charges are all tariffed obligations, far which CCI, not PSE (which would have the revenue stream to satisfy such charges), would be obligated;

CCI currently has eight CSTP-II plans. (See Second Supplemental Certification of Carl Williams at ¶ 3, filed herewith,) As *of* November 27, 1995, the traffic run rates on the

CCI plans indicate a projected shortfall of approximately $20.2 million. (*Id.*, ¶ 4.) If all or substantially ail of the locations under the plans were transferred tu PSE, the amount *of* the projected shortfall would increase by approximately $13.293 million. (*Id.*, ¶ 5.) Moreover, after transfer of it4 assets (the locations under the Plans) *to* PSE, CCI's net worth would decrease and its ability to pay any shortfall charges be diminished proportionately. (*See id.*, ¶ 6.) Thus, if *the* Court were to grant the requested injunction, and AT&T were to ultimately prevail on the merits, the potential financial loss to AT&T would exceed the projected $13.223 million increased shortfall charge. Accordingly, in the event the Court decides to grant the injunction, AT&T requests that the Court require security in the amount of $15,000,000.[3]

III. EVEN IF THE COURT DETERMINES THAT IT, *NOT* THE FCC, SHOULD DECIDE THE QUESTION OF PRELIMINARY RELIEF ON THE FRACTIONALIZATION ISSUE, PLAINTIFFS' MOTION SHOULD BE DENIED.

If the Court determines that it should decide the fractionalization issue in the first instance, it should nevertheless deny plaintiffs' application for a preliminary injunction. Plaintiffs' failure to establish two essential prerequisites for preliminary relief --- a likelihood of success on *the* merits and irreparable harm --- dooms their application. As the Third Circuit has noted,

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[3] This is based on a conservative estimate that, absent an asset transfer, CCI would be able to satisfy at least 10% of the current *$20.2* million in projected shortfall.

a "[t]o obtain a preliminary injunction, the moving party must demonstrate *both* a likelihood of success on the merits and the probability of irreparable harm if relief is not granted." *Hoxworth v. Blinder Robinson & Co.*, 903 F.2d 186, 197 (2d Cir. 1990) (quoting *Morton* v. *Beyer*, *822* F.2d 364, ***367*** (3d Cis, 1987)) (emphasis in original).

A, Plaintiffs Cannot Show A Likelihood That They Will Succeed On The Merits.

Plaintiffs cannot show that there is a likelihood that they will succeed on the merits. Section 2.2.4.A.2 of the tariff (the anti-fraud provision) permits AT&T to refrain from accommodating schemes whose purpose was to prevent AT&T from collecting tariffed charges from customers.[4] (Meade 2d Supp. Cert., ¶ 5.) Section 2.8.2 allows AT&T to temporarily suspend service for as long as the customer is in non-compliance with Section 2.2.4.A.2.[5] Section

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[4]Section 2.2.4 of Tariff No. 2 provides, in the relevant part, as follows:

> **Fraudulent Use** - The fraudulent use of, or the intended or attempted fraudulent: use *of, WRTS* is prohibited. The following activities constitute fraudulent use:
>
> A. Using or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by:
>
> * * *
>
> 2. using fraudulent means or devices, tricks, schemes, false or invalid numbers, false credit devices, or electronic devices.

[5]Section 2.8.2. of the Tariff No. 2 provides, in the relevant part as follows:

(continued...)

2.5.8 of the tariff (the security deposit provision) permits AT&T to request security from certain customers in order to safeguard AT&T's financial interests.[6] (Meade 2d Supp. Cert., ex. B *at* 1.)

CCI's proposed transfer *of* almost all of the locations on the CSTP-II plans ("Plans") to PSE would have transferred most, if not all, of CCI's assets (*i.e.* the revenue stream from the traffic) to PSE without a concomitant transfer of the obligation to pay shortfall charges, (Meade 2d Supp. Cert., ¶ 6.) AT&T refused to execute the transfer of locations on the Plans from CCI to PSE because AT&T believed that this second transfer was part of a scheme by Alfonse Inga to prevent AT&T from collecting potential shortfall charges under the Plans. *(See* Meade 2d Supp. Cert., ¶ 4.) Alfonse lnga had already represented that he desired to leave

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[5](...continued)
Interference, Impairment or Improper Use - The Company **may take immediate** action to **temporarily suspend** service **when** a Customer **violation** results in any **of** the **following:**

* * *

- circumvents the Company's ability to charge **for its services** *as* **specified** in Section 2.2.4. (Fraudulent Use) **preceding,** or . . . .

[6]Section 2.5.8 **of** AT&T F.C.C. **Tariff** No. 2 **reads,** in **pertinent** part:

2.5.8 Deposits **-** The **following** deposit provisions **are applicable to WATS.**

A. To **safeguard** its **interests, the** Company **will only require** a **Customer** which has a proven history **of late payments to the Company** or **whose** financial **responsibility** is not **a** matter **of** record, to **make a** deposit *to* **be held** as a guarantee for **the payment of charges.**

AT&T with a substantial financial loss and no remedy. (See Certifications of Joseph Fitzpatrick and Thomas Umholtz, ¶¶ 4 and 4, respectively, filed March 7, 1995.)[7] AT&T's concern about the apparently fraudulent purpose of the Inga Companies' two-step transaction was memorialized in a letter from AT&T's counsel to counsel for the Inga Companies, whose traffic PSE was to receive indirectly:

> We have reason to believe that Mr. Inga is attempting *to* transfer end users from existing plans that have over $50 million of commitments. Mr. Inga's efforts to transfer these end users and leave the plans intact with their commitments, but without the ability to satisfy those commitments, appears to us to be an attempt to defraud AT&T by obtaining the benefits of a transfer of service and at the same time deprive AT&T of the commitments made to obtain that service, AT&T will not tolerate that conduct.

Exhibit A to Affidavit of Frederick L. Whitmer (filed March 7, 1995 and attached as exhibit C to the Brown Aff.) The Inga Companies did not answer that letter; neither did CCI past the requested security.

AT&T also had a legitimate concern about such a transaction in light of the high delinquency rate of resellers. (Certification of Carl Williams, ¶¶ 4-9, filed March 20, 1995 and attached as exhibit D to the Brown Aff.) CCI, a new company that had virtually no *assets*, would have assumed $54 million in annual commitment without having any revenue stream to enable it to pay shortfall charges to AT&T. That fact, combined with CCI's apparent role in Mr. Inga's

[7] Copies of the Certifications of Joseph Fitzpatrick and Thomas Umholtz are attached as exhibits A and B, respectively, to the Affidavit of Richard H. Brown, III ("Brown Aff."), filed herewith.

scheme, led AT&T *to* decline to **carry** out the **transaction** as **proposed** by CCI. (Meade 2d Supp. Cert., ¶ 4.) In light of **the foregoing,** AT&T's decision **to** refuse to fractionalize the traffic was, and remains, entirely **reasonable.** CCI's refusal to post **security** gave AT&T *the* right *to* refuse **to execute** the **transfer** of the locations and thereby avoid **increasing** AT&T's **financial** exposure. It also **precludes a finding** that **plaintiffs have** a **substantial** likelihood of success on the merits.

AT&T's **right** under the tariff to refuse to ***execute the*** CCI-PSE transfer similarly forecloses **relief** under **Section** 4C6 of **the Communications Act, even** if the Court deems **this section** to **be applicable** to CCI-PSE transaction.[8] **Although** the **mandamus writ was abolished by *Fed,*** *R. Civ. P.* 81(b), **the rights of the** parties **under *Section*** 406 are **still governed by mandamus principles,** which **require that** the party **seeking the mandamus** demonstrate that it **has** a "clear and unequivocal" right **to** that **which** it is seeking. *MCI*

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[8]Section 406 **of the** Federal Communications **Act, provides:**

> **The** district **courts of the United** States shall **have jurisdiction upon** the **relation of** any person **alleging any** violation, **by a** carrier subject **to** this chapter, **of** any **of** the provisions of **this** chapter **which** prevent the relator **from** receiving service **. . . to** issue a writ or writs of **mandamus** . . . commanding **such** carrier **to furnish facilities** for such **communication** or **transmission** to **the** party applying for **the writ** . . . .

AT&T's position, **as** stated more fully in **its** earlier submissions, is **that** CCI-PSE's **proposed** transfer **of** locations under ***the*** CSTP-II **plans *is* not** the **type** of "service" for which **this** section **was** enacted **to afford** mandamus relief,

Communications Corp. v. American Tel. & Tel. Co., 496 F.2d 214, 219 (3d Cir. 1974); *accord Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1036 (10th Cir. 1993). For the reasons described above and given the Court's earlier statement that it needed guidance from the FCC, any putative right of CCI to transfer the locations without posting a security deposit would certainly not be a clear and unequivocal one. Accordingly, relief under section 406 is inappropriate.

B. Plaintiffs Cannot Show Irreparable Injury.

Plaintiffs' application also fails because these is no *irreparable* harm to plaintiffs. *See, e.g., Frank's* GMC *Truck Center, Inc. v. General Motors* carp., 847 F.2d 100, 102 (3d Cir. 1988) (reversing preliminary injunctian because no irreparable harm); *Bakery Drivers & Sales Local 194 v. Harrison* Baking *Group, Inc.*, 869 F. Supp. 1168, 1179 (D.N.J. 1994) (no preliminary injunction because no irreparable harm). Indeed, plaintiff Winback has effectively admitted there is no genuine irreparable harm when it has, on more than one occasion, described its supposed injury purely in monetary terms. Most recently, Alfonse *G.* Inga alleged Winback's injury as being more than $1 million dollars per month. (See Mr. Inga's statement annexed as exhibit C to Winback's July 27, 1995 Brief.) Nowhere in any submission by Winback (or in the other plaintiffs' earlier submissions) is there an injury that can be characterized as "irreparable." Winback's past characterization

of this action as one "about money" (Trans. Mar. 8, 1995, p. 69, l. 14) remains true.

Plaintiffs' alleged injury (loss of revenue or customers due to allegedly not having access to lower prices) is simply an economic lass. Our Court of Appeals has clearly stated that, in such a situation, preliminary injunctive relief is not appropriate. For example, in *Frank's GMC Trucks*, the Third Circuit reversed the preliminary injunction because the applicant's complained-of harm (loss of sales, customers and profits) was, in fact, compensable by money damages. 847 F.2d at 102. *Accord Instant Air Freight Co. v. C.F. Air* Freight, *Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). That is this case. Accordingly, given the lack of irreparable harm and plaintiffs' failure to demonstrate a reasonable likelihood of success on the merits, their motion fur preliminary relief must be denied,

CONCLUSION

For *the* foregoing reasons, AT&T urges that plaintiff Winback's reapplication for a preliminary injunction be denied, or, in the

alternative, that if a preliminary injunction is issued, a bond in the amount $15,000,000 be required from plaintiff CCI.

Respectfully submitted,

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